

period of time." *Further Notice* at ¶ 10. Extending the holding period alone will not result in the desired benefits, however, if licensees are free to deviate from the proposals that made them the best qualified without any notification to the Commission. Thus, the Commission should extend the reporting requirements of § 73.1620(g) to cover the entire holding period.

At the time of the enactment of § 73.1620(g), the Commission only required licenses to be held for one year. Although some proponents sought a three-year reporting requirement, the Commission, looking to the one-year holding period, decided that one year would be sufficient for the reporting requirement as well. *Comparative Hearing Reform*, 6 FCC Rcd at 160, n. 17. Now that the Commission is proposing to amend § 73.3597 to require a longer holding period, the reporting requirement should be similarly modified.

In addition to the benefits to the public flowing from applicants, adherence to their promises, the extended reporting requirement would aid in eliminating sham promises. Since all commitments not kept for the full holding period would have to be admitted to the Commission, insincere applicants would be deterred from applying in the first place.

D. Whether an increase in the holding period should be applicable to all existing and future authorizations obtained through the comparative process.

The Commission recognizes that "the immediate application of a longer service continuity requirement would maximize [the] effectiveness" of the requirement. *Further Notice* at ¶ 16. The Commission therefore contemplates the application of the proposed extended holding period to all existing as well as future applicants. *Id.* We fully agree with the Commission's proposal because the public interest can be adequately served only if the extended holding period is made binding on all existing as well as future licenses.

The Commission is required by its own findings to apply the new rule to all existing as well as future licenses. In *Geller v. FCC*, 610 F. 2d 973 (D.C. Cir. 1979), the court held that where the public interest justification of a Commission regulation has evaporated, the Commission is statutorily bound to determine whether another public interest justification exists if it wishes to retain the regulation. *Id.* at 980. In *Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992),³ the Commission, interpreting *Geller*, posited a duty to apply new rules to pending cases in spite of adverse effects on some applicants if failing to do so would violate the public interest. *Anchor*, 7 FCC Rcd at 4568.⁴

In the Notice initiating this proceeding, the Commission "acknowledges . . . that rapid transfer of a station awarded after a comparative selection appears to 'eviscerate' the rationale of the comparative process." *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2668 (1992) ("*Notice of Proposed Rulemaking*".) See also *Further Notice* at ¶ 10. Therefore, if the Commission finds that rapid transfer of station licenses does indeed eviscerate the public interest justification of the comparative process, as we believe it does, the Commission must apply the new rule to all licensees.

³In *Anchor*, the Commission considered whether it should continue to apply the integration criterion in a comparative hearing while a rulemaking to re-examine the policy statement on comparative hearings (Docket 92-25), including use of the integration criterion, was pending. 7 FCC Rcd at 4567, 4568.

⁴ The Commission, stated, "if any new policies adopted in the Rulemaking were premised on a conclusion that . . . changed circumstances . . . have eviscerated the public interest basis of the integration criterion . . . it is arguable that there would no longer be a public interest justification for using the integration criterion and the Commission would not have the discretion to do so irrespective of the impact on pending cases." *Id.* at 4568. (Emphasis added.)

Moreover, if the Commission does not make the extended holding period applicable to existing applicants and licensees, the effectiveness of the new rule will be severely curtailed. There are more existing stations than there are new licenses to be distributed through the comparative process. To not apply the extended holding period to existing applicants and licensees would diminish the impact of the new rule considerably. A significant number of stations could still be sold soon after having been acquired. The rapid turn-around would contravene the Commission's twin goals of enhancing the public interest benefits by assuring the public of greater continuity of service and also of safeguarding the entire comparative hearing process from insincere proposals. *Further Notice* at ¶ 10. Therefore, to allow existing licensees to sell their licenses before termination of the extended holding period would be counter to the Commission's reasons for promulgating the new rule in the first place.

The Commission itself made a similar argument in *General Telephone Company of the Southwest et al. v. United States and Federal Communications Commission*, 449 F. 2d 846 (5th Cir. 1971). In that case, the Commission had found that the preferential treatment given by telephone companies to affiliated CATV systems harmed the public interest. *Application of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 FCC 2d 307, 323 (1970). The Commission therefore enacted a rule prohibiting telephone companies from furnishing CATV service in their service areas. *Id.* at 330. The rule required the divestiture of systems acquired prior to the promulgation of the rule. *General Telephone*, 449 F.2d at 863. The court found that for the Commission to grandfather existing CATV/telephone alliances

would be counter to the fundamental public interest purpose of the enacted rule. *Id.* at 863, n. 16.

In the present case, the purpose behind the extended holding period is to assure the public of greater continuity of service from the applicant found to be the best qualified. Allowing existing licensees to avoid application of the extended holding period negates the fundamental purpose of the rule as it denies the public the assurance of a longer period of service continuity from the comparative process winners. Therefore, just as in *General Telephone*, to not make the proposed rule applicable to existing applicants and licensees would work against the efficacy of the rule and the reasons for its promulgation.

As demonstrated by *General Telephone*, in which application of the rule required divestiture of CATV systems, adverse effects resulting from the application of a new rule to existing systems can be rather harsh if the public interest so requires. In this case, however, the only "adverse" effects resulting from the application of the proposed holding requirement to all licensees would be to limit the opportunity to traffic in licenses. Licenses that were granted their licenses within the last three years (or whatever holding period is adopted) would not be adversely affected unless they obtained those licenses with the intent of trafficking. All licensees with legitimate reasons for wanting to transfer their licenses prior to the expiration of the holding period would be eligible for a waiver from the Commission.

In conclusion, the increased holding period should be applied to all future authorizations. Without uniform application of the extended holding period, the effectiveness of the proposed rule will be seriously diminished.

E. Whether the Commission should initiate a proceeding to inquire whether service continuity requirements should be imposed with respect to facilities acquired other than through the comparative hearing process.

For all of the reasons discussed in Part I, we believe that the public interest would be served by a trafficking rule that applied to all licenses, whether or not they were acquired through the comparative hearing process. The public interest benefits of longer holding periods include better understanding of community needs, increased investment in programming (particularly news and public affairs), greater incentive to comply with important FCC policies regarding children's educational programming and equal employment opportunity, market stability and greater opportunity for minority ownership. These benefits would be greatly enhanced if a holding period, with appropriate waiver provision, were applied across-the-board. We are disappointed that the Commission failed to propose such a rule in the Further Notice, and instead is asking only for comment on whether to initiate yet another proceeding. Thus, we ask that the Commission initiate such a proceeding expeditiously.

Conclusion

For the foregoing reasons, we support the Commission's proposal to adopt an extended holding period applicable to all existing and future licensees that receive their licenses through a comparative hearing. We urge that same holding period apply to authorizations obtained as the result of a settlement in comparative hearing proceedings. We strongly recommend that the new holding period be made equal in length to one license term, thereby requiring licensees to undergo the scrutiny of a renewal hearing at least once. In addition, we urge the Commission to amend its reporting requirements in §73.1620(g) to


coincide with the longer holding period. Finally, we request that the Commission promptly initiate a new rulemaking to extend the application of the revised holding period to all licensees, regardless of how they obtained their licenses.

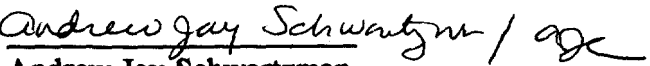
Respectfully submitted,

Of Counsel:

Laura Rovner
Graduate Fellow

Bettina Pruckmayr
Jim Black
Student Interns


Angela J. Campbell
Citizens Communications Center
Institute for Public Representation
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535


Andrew Jay Schwartzman
Gigi Sohn
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

October 13, 1993